

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORNELIUS WEBB,

Defendant-Appellant.

UNPUBLISHED

May 22, 2003

No. 238195

Wayne Circuit Court

LC No. 01-002342 - 01

Before: Murray, P.J., and Neff and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317. He was sentenced to twenty-five to forty-five years in prison, with 238 days credit for time served. Defendant now appeals as of right. We affirm defendant's conviction and sentence, but remand to the trial court in order to make a determination of whether defendant is entitled to additional credit for time served in federal custody.

Defendant argues that he should have been awarded additional days of credit for time served to reflect the time he was in federal custody pursuant to MCL 769.11b. Whether the trial court erred in awarding a defendant credit for time served is an issue of law reviewed de novo by this Court. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997).

Prior to sentencing, defendant submitted a memo to the trial court stating that because defendant was indicted and detained by the federal government for charges stemming from the same murder involved in the present case, either defendant was entitled to credit for time served in federal custody or the sentencing court should sentence him at the lower end of the sentencing guidelines range. At the sentencing hearing, the court had not yet read defendant's sentencing memo and informed defendant that it was not willing to rule on this issue. The trial court did, however, indicate that it would issue a ruling at a later date. The trial court has apparently not done so.

In order for a defendant to be entitled to sentence credit for presentence time served, "a defendant must have been incarcerated 'for the offense of which he is convicted.'" *People v Prieskorn*, 424 Mich 327, 344; 381 NW2d 646 (1985). Defendant argues, and the prosecution agrees, that defendant should have been awarded credit for time served in federal custody. Given the information before us, however, we are unable to make a determination whether defendant's federal incarceration was for the same offense for which he was convicted.

Additionally, with the information before us, we are unable to determine the dates defendant was detained and released by the federal authorities. Therefore, we remand to the trial court to make a determination of the amount, if any, of credit defendant should have received for time served in federal custody.

Next, defendant argues that the trial court erred in scoring the sentencing guidelines, which resulted in a disproportionate sentence. Since the murder occurred before January 1, 1999, the judicial sentencing guidelines apply. MCL 769.34(1). Defendant argues that the trial court misinterpreted a guidelines scoring instruction by scoring offense variable (OV) 3 inconsistently with the jury verdict. The relevant instruction provides: “The sentencing judge must score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury.” Michigan Sentencing Guidelines (2d ed, 1988), p 77. To the extent that defendant predicates error on the trial court’s misinterpretation of the guidelines instruction, defendant fails to state a cognizable legal claim. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). The judicial sentencing guidelines at issue in this case are only a tool to guide the trial courts, do not have the force of law, and appellate courts are not to interpret the guidelines and rescore the variables to determine if they were correctly applied. *Id.* at 176-178. Therefore, this Court cannot grant relief based on the trial court’s alleged misinterpretation of a guidelines instruction. *Id.* Regardless, even if OV 3 had been scored as defendant argues, defendant’s sentence guidelines range remains unchanged. Thus, defendant’s minimum sentence fell within these guidelines and the trial court did not abuse its discretion. See *id.* Accordingly, defendant’s argument is without merit.

We affirm defendant’s sentence as it pertains to the scoring of OV 3 and remand to the trial court for a determination of whether defendant is entitled to additional credit for time served. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Janet T. Neff

/s/ Michael J. Talbot